IMPLIED WARRANTIES IN SALES.

A BRIEF examination of the development of the implied warranties which the courts have recognized, or shown an inclination to recognize, as growing out of sales of chattels, may tend to make more clear the law as it is now settled in that respect, and furnish also an interesting example of the development of rules of law.

As Professor Ames has already pointed out in this REVIEW in his article on the History of Assumpsit,[1] the original remedy for breach of warranty of chattels was in an action on the case, the essential allegation being "*warrantizando vendidit.*" The importance of making this allegation in such form that the warranty shall appear to have been a part of the sale, and not subsequent to it, is made apparent in Mew *v.* Russell,[2] which was an action on the case on a warranty, the allegation being that whereas the plaintiff bought of the defendant so many hogsheads of wine at such a price, the defendant, "*in consideratione inde warrantizabat et affirmabat adtunc et ibidem ea esse bona*," etc. It was urged that this showed but a voluntary promise made afterwards and (as stated in the report of the case in Skinner) on an executed consideration. But the court thought this objection "too nice," and that "*adtunc et ibidem*" showed it to be "all at an instant." In a case relied upon in argument it had been held in an action on the case for deceit in the sale of a mare that "*warranitzavit et vendidit*" was not good for the reason suggested.[3]

From Stuart *v.* Wilkins,[4] decided in 1778, and Williamson *v.* Allison,[5] decided in 1802, it appears that the introduction of action in assumpsit, instead of on the case, for breach of express warranty, was then recent, the advantage of the new form being that the money counts might be added (for instance, a count for money had and received, the consideration having failed). But in the latter of these cases Lawrence, J., declares the old form of action in tort to have been still in general use during his time at the bar.

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[1] 2 Harv. Law Rev. 1, at page 8.

[2] 2 Show. 284; S. C. (*s. n.* Moor *v.* Russell) Skin. 104.

[3] Pope *v.* Lewyns, Cro. Jac. 630. See also Lysney *v.* Selby, 2 Ld. Ray. 1118.

[4] 1 Doug. 18.

[5] 2 East, 446.

The general remedy available to vendee against vendor for falsehood, fraud, or misrepresentation was by action on the case in the nature of deceit. But to support this action it was necessary to allege and prove that the vendor knowingly misrepresented the facts, or falsely promised that which he knew would not prove true. The allegation in such cases was, not only that the defendant "*falso et deceptive*" made the representation or promise, but that it was made "*sciens*," etc. In other branches of the law there might be remedy for injury from mere falsehood, or concealment, or abuse of confidence; but to recover in tort for deceit, the older cases, in general, allowed no evasion of the requirement that the representation complained of must have been known by defendant to be false. A few cases cited in the note [1] will show how persistently the courts drove the vendee who complained of being cheated to alleging and proving a warranty, whereby the vendor took upon himself the risk as to the truth of the representation complained of, or the alternative of showing a false representation, made with the knowledge of its falsity. The modern refinement of holding the vendor responsible for stating as true within his own knowledge that which he does not know to be true,[2] finds no recognition in the older cases. The responsibility is upon the buyer; if he does not choose to insist upon a warranty, he must rely upon his own knowledge and judgment.[3] This is the doctrine of *caveat emptor*.[4]

Notwithstanding the definiteness with which the doctrine of *caveat emptor* has thus been repeatedly announced and applied, constant efforts have been made, with varying degrees of success, to establish exceptions to it in particular classes of cases, by securing the recognition of implied warranties. Perhaps the earliest of

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[1] Chandelor *v.* Lopus, Cro. Jac. 4; Sprigwell *v.* Allen, Aleyn, 91; Paget *v.* Wilkinson, as noted in 2 East, 448; Stuart *v.* Wilkins, 1 Doug. 18; Early *v.* Garrett, 9 B. & C. 928 (*per* Littledale, J., 932); Seixas *v.* Woods, 2 Caines, 48; Perry *v.* Aaron, 1 Johns. 129; Stone *v.* Denny, 4 Met. 151; Hammatt *v.* Emerson, 27 Maine, 308; Jackson *v.* Wetherill, 7 S. & R. 480; McFarland *v.* Newman, 9 Watts, 55.

[2] Litchfield *v.* Hutchinson, 117 Mass. 195.

[3] As Fitzherbert puts it (after mentioning the action upon the case for breach of warranty for sale of corrupt wine, or of a lame or diseased horse), "But note: it behooveth that he warrant it to be good, or the horse to be sound, otherwise the action will not lie. For if he sell the wine or horse without such warranty, it is at the other's peril, and his eyes and his taste ought to be his judges in that case." Nat. Brev. 94 c.

[4] Lord Coke states the doctrine thus: "Note that by the civil law every man is bound to warrant the thing that he selleth or conveyeth, although there be no warranty; but the common law holdeth him not, unless there be a warranty either in deed or in law, for *caveat emptor*." Co. Litt. 102, a.

these attempts was in regard to the doctrine of implied warranty of title.

In an action of deceit brought in the time of Elizabeth, in which it was claimed that the defendant had sold as his own the goods of another, it was held by Periam and Wyndham that the action did not lie because it was not alleged that the defendant, "*sciens* that they were the goods of a stranger," etc. "But if it had been so alleged, the action did lie, for it may be the defendant did know no otherwise but that they were his own goods; but if he had affirmed that they were his own goods, then the action would lie." Anderson, *contra*: "For it shall be intended, that he that sold had knowledge whether they were his own goods or not." It was adjudged against the plaintiff.[1] Here Anderson insisted on an implied warranty of title pure and simple; whether the other two judges would have held an express affirmation of title to be a warranty or a ground of action for deceit notwithstanding the absence of a *scienter*, seems not to be clear. During the reign of James I. a similar question arose in an action on the case in the nature of deceit based on an allegation by the defendant in the sale of tithes that he was the lawful incumbent of the vicarage and entitled thereto, and it was charged that, knowing himself not to have such right, he "*falso et deceptive*" etc. The defendant, in arrest, claimed that to sell that to which he had no title was not ground of action, there being no warranty. Tanfield, C. B., distinguished a case in the Year Books[2] where it was held that one having tortious possession and knowingly selling as his own was liable. But here there was no possession, and the decision was for the defendant.[3] During the same reign it was alleged in an action on the case that the defendant "*falso et deceptive*" sold to the plaintiff sheep, affirming they were his own when they were another's. It was moved in arrest because it did not appear that the defendant had committed any offence in affirming they were his own. "*Sed non allocatur*, for the sale of goods which were not his own, but affirming them to be his goods, knowing them to be a stranger's, is the cause of action," and it was adjudged for the plaintiff.[4] Here there seems to be uncertainty. The statement does not show that knowledge was alleged, and the defendant urges the objection; but the ruling of the court is against him on the ground that he had knowledge. In 1689, in an action

[1] Dale's Case, Cro. Eliz. 44, C. B.
[2] 42 Ass., pl. 8.
[3] Roswel *v.* Vaughan, Cro. Jac. 196, Exch.
[4] Furnis *v.* Leicester, Cro. Jac. 474, B. R.

on the case, it was alleged that the defendant sold oxen in his possession, affirming that they were his, when they were not. It was held that *scienter* was not necessary, and that action would lie upon the bare affirmation, the plaintiff having no means of knowledge as to the ownership but by the possession.[1] But in another report of the same case[2] it is said the objection might have been good on demurrer, but after verdict the declaration was well enough. In Medina *v.* Stoughton,[3] where recovery in case was sought against the defendant for selling a lottery ticket, which he had in his possession, as his own when it was not, Lord Holt says that "When one having the possession of property sells it, the bare affirming it to be his amounts to a warranty, and an action lies on the affirmation, and perhaps no other title can be made out; *aliter* where the seller is out of possession, for there may be room to question the seller's title, and *caveat emptor* in such case to have either an express warranty or a good title." The latter part of this statement is not found in the report of the case in Lord Raymond, and the whole of it is *dictum*, for the case went off on a question of pleading.

Blackstone in his Commentaries[4] states the law broadly as corresponding to the civil law in allowing recovery against one who sells as his own, if the title proves deficient, without any express warranty, and for this cites only Furnis *v.* Leicester[5] and Rolle's Abridgment; yet this statement, practically unsupported, seems to be the basis of the line of decisions in this country on the subject. Boyd *v.* Bopst[6] (1785), in which, as reported, no cases are cited, and Defreeze *v.* Trumper[7] (in 1806), citing Blackstone only, are the earliest cases, and lay down the rule without qualification, to the effect that the sale alone implies a warranty of title. Kent follows Lord Holt's *dictum* as to the effect of the seller's possession, and later cases in the United States are mostly in accord with him.[8]

But in England no such result was reached from the cases. In Ormrod *v.* Huth[9] (1845), it was suggested that in cases in which there had been a recovery for defective title, it would be found that

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[1] Crosse *v.* Gardner, Carth. 90; s. c. 1 Show. 68, B. R.

[2] Mod. 261, *s. n.* Cross *v.* Garnet.

[3] 1 Salk. 210; s. c. 1 Ld. Raym. 593.

[4] 2 Bl. Com. 451; see also 3 Id. 165.

[5] Cro. Jac. 474, *supra.*

[6] 2 Dall. 91, in Superior Court of Pennsylvania, at *nisi prius.*

[7] 1 Johns. 274.

[8] Scranton *v.* Clark, 39 N. Y. 220; Charnley *v.* Dulles, 8 W. & S. 353, 361; Coolidge *v.* Brigham, 1 Met. 547, 551; Shattuck *v.* Green, 104 Mass. 42, 45.

[9] 14 M. & W. 651, Exch. Ch.

there was either an assertion of title embodied in the contract, or a representation of title which was false to the knowledge of the seller. And in Morley *v.* Attenborough [1] (1849), the Court of Exchequer went over the whole ground in an action against a pawnbroker for selling a harp to which his title was, without his knowledge, defective because the harp did not belong to the pledgor, and held that unless there was an express warranty of title or something in the transaction indicating an affirmation equivalent to an express warranty, there could be no recovery for defect of title not known to the seller. This view of the law has received the approbation of at least one court in the United States.[2] But the suggestion in Morley *v.* Attenborough that sale of goods in a shop might in itself be held to imply a warranty of title, has been followed in a later case,[3] where the judges agree that the offering for sale is, under ordinary circumstances, a warranty of title.

The introduction of implied warranties of quality can be sufficiently discussed in a few words, although the law on the subject is much more extensive. In some early cases it was said that a seller of corrupt victuals was liable in case for the deceit,[4] regardless of his knowledge; but afterwards it was decided that this peculiar liability was imposed only on common dealers in victuals, and, even as to them, resulted not from the common law, but from an ancient statute.[5] In the United States, Blackstone's broad statement that "In contracts for provisions it is always implied that they are wholesome," [6] was early followed in New York; [7] but in that State the doctrine was by subsequent cases strictly limited to a presumption of warranty arising from sale of provisions by a dealer for consumption, and not from sale of provisions as mere merchandise; [8] and the same result has been reached in other States.[9]

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[1] 3 Exch. 499.

[2] Howland *v.* Doyle, 5 R. I. 33; but the same court modifies its position in Burgess *v.* Wilkinson, 13 R. I. 646.

[3] Eichholz *v.* Bannister, 17 C. B. N. S. 708.

[4] Y. B., 9 H. 6, 53; Keil. 91; Fitzh. Nat. Brev. 94 *c.*

[5] Burnby *v.* Bollett, 16 M. & W. 644. This view is countenanced by language used by the court in Roswel *v.* Vaughan, Cro. Jac. 196, where it is said that for the sale of corrupt victuals action lies without warranty, because it is against the commonwealth.

[6] 3 Bl. Com. 165.

[7] Van Bracklyn *v.* Fonda, 12 Johns. 468; to same effect, Hoover *v.* Peters, 18 Mich. 51.

[8] Wright *v.* Hart, 18 Wend. 449; Moses *v.* Mead, 1 Denio, 378.

[9] Emerson *v.* Brigham, 10 Mass. 197; Howard *v.* Emerson, 110 Mass. 320; Giroux *v.* Stedman, 145 Mass. 439; Humphreys *v.* Comline, 8 Blackf. 516; Ryder *v.* Neitge, 21 Minn. 70.

As to quality in general, all the justices and barons but one in Exchequer Chamber in the famous case of Chandelor *v.* Lopus,[1] which was an action on the case for selling a stone representing it to be a bezoar stone, when it was not, set their faces against any liability on a representation not knowingly false, and not made a warranty. Indeed, they seem to have gone farther, and reversed the judgment of King's Bench, which had held the defendant liable for knowingly misrepresenting the stone in this respect;[2] but from a statement of the same case in another place,[3] it appears that the reversal in Exchequer Chamber was because knowledge of the falsity of the representation was not pleaded. This statement of the case, made in argument fifteen years after the decision, is perhaps as reliable as that in Croke's report, first published more than fifty years after the case was decided. It was not, however, until the early part of this century that cases of any decisive value on the implied warranty of quality are found. In Stuart *v.* Wilkins,[4] Lord Mansfield had intimated that a sound price did not imply a warranty of soundness, and that knowledge or express warranty must be proved to establish liability in assumpsit; and this opinion was followed in Parkinson *v.* Lee,[5] which was an action in assumpsit to recover for the sale to the plaintiff of damaged hops, the defect not being known to either party. The court refused to recognize an implied warranty that the goods were merchantable. But where the article was manufactured or supplied for a particular purpose, as saddles for a particular trade,[6] copper sheathing for a ship, bought from one regularly dealing in such supplies,[7] or rope adjusted to certain tackle for a definite use,[8] it was held that the seller was liable for the defect without any proof of knowledge on his part. And where goods were sold under a particular description, as that of "waste silk,"[9] or "scarlet cuttings,"[10] or a "copper-fastened vessel,"[11] it was held that the buyer was entitled to damages if they were not

[1] Cro. Jac. 4 (1603).

[2] The opinion of Popham, C. J., in King's Bench is stated in a note to 1 Dyer, 75, *a*.

[3] 2 Rolle's R. 5.

[4] 1 Doug. 18 (1778).

[5] 2 East, 314 (1802).

[6] Laing *v.* Fidgeon, 6 Taunt. 108 (1815).

[7] Jones *v.* Bright, 5 Bing. 533 (1829). A similar case in King's Bench was Gray *v.* Cox, 4 B. & C. 108 (1825).

[8] Brown *v.* Edington, 2 M. & G. 279 (1841).

[9] Gardner *v.* Gray, 4 Camp. 144 (1815).

[10] Bridge *v.* Wain, 1 Stark. 504 (1816).

[11] Shepherd *v.* Kain, 5 B. & Ald. 240 (1821).

such as the description called for. And in a late case Brett, J., speaking for the Court of Appeals, after referring to cases in which it was held that in a sale of "Calcutta linseed," [1] or of "rape oil," [2] the thing sold must not only correspond with the sample, but answer the description, says the fundamental rule is that the article shall answer the description contained in the contract as to being salable, merchantable, fit for the purpose specified, etc., and that in such cases it is immaterial that the defect was not discoverable by the seller.[3]

To treat these various express or implied representations as matters of description in the contract and non-compliance of the article with such description as a breach of contract, is not, however, a complete solution of the difficulty. There is a material difference between breach of an executory contract of sale and breach of warranty.[4] In the one case, acceptance by the buyer of the goods offered in performance of the contract terminates the seller's obligation,[5] while in the other, the seller's liability continues as an obligation to pay damages; but the buyer is not entitled to return the property and recover the purchase-money.[6]

It seems, therefore, that it was in the action on the case for deceit, and not in the action for breach of warranty, that persistent effort was made to introduce the doctrine of an implied obligation,[7] both as to title and as to quality; that these efforts were partially successful, although constantly resisted on the ground that *scienter* was a necessary element of the action for deceit, and that after it became customary, for practical reasons, to bring the action for breach of warranty in assumpsit, the doctrine of implied promise, which had been so instrumental in extending the scope of assumpsit, furnished an escape from all difficulty, and enabled the buyer to rely upon statements or circumstances which, while not showing an express warranty, are recognized as imposing an obligation on the part of the seller.

Another step in the course of development must be noticed.

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[1] Wieler *v.* Schilizzi, 17 C. B. 619 (1856).

[2] Nichol *v.* Godts, 10 Ex. 191 (1854).

[3] Randall *v.* Newson, 2 Q. B. D. 102 (1877).

[4] Lord Abinger, in Chanter *v.* Hopkins, 4 M. & W. 399.

[5] Coplay Iron Co. *v.* Pope, 108 N. Y. 232; and see Merriman *v.* Chapman, 32 Conn. 146.

[6] Street *v.* Blay, 2 B. & Ad. 456; Heilbutt *v.* Hickson, L. R. 7 C. P. 438, 450.

[7] A "warranty in law," as is said in 1 Roll. Abr., title: Action Sur Case, pl. 1 & 2. And see Burgess *v.* Wilkinson, 13 R. I. 646.

As Professor Ames suggests in the article already referred to,[1] the allegation of warranty implied, originally, a very definite undertaking, quite distinct from a mere representation. Lord Holt is said to have introduced the doctrine that no special form of words is necessary to constitute a warranty;[2] but the cases referred to as those in which such a proposition was announced[3] were actions on the case for deceit, and turned on the question as to whether *scienter* was necessary. Lord Holt used no language indicating that he was expressing an opinion as to what would constitute an express warranty. Nevertheless, a great expansion of the scope of express warranty has taken place, and now almost any representation tending to induce the purchase, and which is not about a mere matter of opinion,[4] or a matter about which the buyer is, or in the exercise of reasonable diligence ought to be, as well informed as the seller, and which cannot, therefore, be supposed to have been relied upon,[5] will constitute a warranty.[6]

The result of this course of development has been to leave the doctrine of *caveat emptor* theoretically unchanged, the tendency to recognize higher requirements of honesty and fair dealing on the part of the seller, which threatened its overthrow, having satisfied itself with the extension of express warranty and the invention of various implied warranties which are no longer considered exceptions to *caveat emptor*, but rather as differing from express warranties only in that the obligation which they recognize arises from acts of the seller instead of from words.

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[1] 2 Harv. L. Rev. 1, 10.

[2] *Per* Buller, J., in Pasley *v.* Freeman, 3 Term R. 51, 57 (1789).

[3] Crosse *v.* Gardner, Carth. 90, and Medina *v.* Stoughton, 1 Ld. Raym. 593.

[4] Towell *v.* Gatewood, 2 Scam. 22; Reed *v.* Hastings, 61 Ill. 266.

[5] Margetson *v.* Wright, 7 Bing. 603; s. c. 8 Bing. 454; Schuyler *v.* Russ, 2 Caines, 202; Winsor *v.* Lombard, 18 Pick. 57; McCormick *v.* Kelly, 28 Minn. 135; Humphreys *v.* Comline, 8 Blackf. 516; Barnard *v.* Kellogg, 10 Wall. 383. But the warranty may be such as to relieve the buyer from any duty to exercise his judgment, or may be such as to impose upon the seller liability for the uncertain consequences of a defect. Tye *v.* Finmore, 3 Camp. 462; Holliday *v.* Morgan, 1 E. & E. 1; Pinney *v.* Andrus, 41 Vt. 631; First Nat. Bank *v.* Grindstaff, 45 Ind. 58; Meickley *v.* Parsons, 66 Iowa, 63.

[6] Chapman *v.* Murch, 19 Johns. 290; Henshaw *v.* Robins, 9 Met. 83; Kinley *v.* Fitzpatrick, 5 How. (Miss.) 59; Hanson *v.* Busse, 45 Ill. 496; Hawkins *v.* Pemberton, 51 N. Y. 198; White *v.* Miller, 71 N. Y. 118; Gould *v.* Stein, 149 Mass. 570.